United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/ affidavit of mailing

76-1470

To be argued by
GARY A. WOODFIELD

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1470

UNITED STATES OF AMERICA,
Appellee,

—against—

JOSEPH SETTER,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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Preliminary Statement

Joseph Setter appeals from a judgment of conviction entered on September 24, 1976, in the United States District Court for the Eastern District of New York after a jury trial before the Honorable Henry Bramwell. Appellant was convicted on a five count indictment charging him with distributing and possessing with intent to distribute quantities of cocaine, in violation of Title 21, United States Code, Section 841(a)(1). Appellant was sentenced on Counts One through Four to concurrent terms of seven years imprisonment plus a five year special parole term. He is free on bail pending appeal.[1]

[1] On June 2, 1976, after the jury found appellant guilty on all five counts of the indictment, the trial court dismissed Count Five due to the potential confusion resulting from a variance between what was proved under Count Five and the actual wording of the indictment as the result of a typing error (A. 772).

On appeal, appellant contends that the trial court erred when it found, after a hearing, that the cocaine which appellant surrendered to the authorities at the time of his arrest, which formed the basis of Count Five of the indictment, was not the fruit of an unlawful search and seizure. Thus, he argues, the evidence of appellant's possession of this cocaine improperly tainted the jury's consideration of the remaining counts involving two prior sales of cocaine by appellant.

Appellant also contests the sufficiency of the evidence regarding his sale of cocaine on April 17, 1975, which sale formed the basis for Counts One and Two of the indictment.

Statement of Facts

(1)

On April 10, 1975, Harvey Rosenberg, an individual cooperating with the Drug Enforcement Administration ("DEA"), had a telephone conversation with appellant during which arrangements were made for appellant to sell Rosenberg a quantity of cocaine on April 17, 1975 (A-403).[2]

On April 17, 1975, while being observed by DEA agents on surveillance, and monitored through the use of a recording and transmitting device, Rosenberg purchased one-eighth of a kilogram of cocaine from appellant at his residence at 54-16 Glenwood Road, Brooklyn, New York, for $4,800 (A-71, 72). As evidenced by the recording of this meeting, appellant stated that he was willing to

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[2] References preceded by the letter "A" are to pages of appellant's appendix. References preceded by the letters "Tr." are to pages of the trial transcript.

meet Rosenberg's "buyer", New York Drug Enforcement Task Force Detective James Copeland (A-72, Government's Exhibit 23).

Such a meeting was arranged and on April 24, 1975, Rosenberg introduced Detective Copeland to appellant at the Grotto D'Oro Restaurant in Brooklyn (A-78). After conversing with the undercover detective, appellant agreed to supply him with quantities of cocaine (A-78). Appellant provided Detective Copeland with a telephone number where he could be reached and arrangements were made for appellant to sell Detective Copeland one-eight of a kilogram of cocaine for $5,500 on April 28, 1975 (A-82).

After calling appellant to confirm the transaction for that evening of April 28, 1975, Copeland proceeded to appellant's residence (A-84, 85). Upon entering appellant's residence, the detective was supplied with a quantity of cocaine by appellant (A-86). When weighed on a scale provided by appellant, the cocaine was found to be less than the anticipated one-eighth kilogram (A-86). Appellant, blaming the shortage on his girlfriend, thereafter twice retrieved additional quantities of cocaine from the living room area of his apartment to attain the previously negotiated amount (A-86, 87). Satisfied with the cocaine provided him, Detective Copeland paid appellant $5,500 and departed (A-87).

On May 19, 1975, Detective Copeland telephoned appellant and expressed his dissatisfaction with the quality of the cocaine supplied by appellant on April 28, 1975. A meeting was arranged for May 21, 1975, at the Grotto D'Oro Restaurant (A-98, 111). At this meeting on May 21, 1975, Copeland reiterated to appellant his dissatisfaction with the previously supplied cocaine (A-113). Nevertheless, he expressed interest in an additional larger nar-

cotic purchase, to which appellant was agreeable (A-113). However, no such transaction was consumated.

On July 3, 1975, pursuant to an arrest warrant, appellant was arrested as he exited his apartment and was immediately advised of his pertinent Constitutional rights by Sergeant Rawald of the Task Force (A-176, 177). Appellant, expressing a desire not to disturb his parents who resided on a floor immediately below his apartment, requested that he be allowed to re-enter his apartment to feed his cat and make a telephone call (A-180). After a "pat down" search, appellant and several members of the Task Force entered appellant's apartment (A-181). Once inside, Sergeant Rawald asked appellant if he had any additional narcotics in his apartment (A-181). Appellant acknowledged that he did and escorted the officers to his bedroom where he retrieved from a locked cabinet in a closet a shoe box which contained approximately one-half of a pound of cocaine (A-181, 182). Appellant gave this package to the authorities (A-182).

(2)

Prior to the commencement of the trial, a suppression hearing was held regarding the recovery of cocaine from appellant at the time of his arrest on July 3, 1975. At the hearing Sergeant Rawald and DEA Agent Ebert testified concerning appellant's arrest, advise of rights, and his subsequent voluntary surrender of the cocaine in his apartment (A-19, 20, 57). Both testified that it was appellant's desire to re-enter his apartment. Although the officers accompanied appellant into his apartment, no search of the apartment was conducted (A-21). Upon being asked whether there were any narcotics in his apartment, appellant led the officers to his bedroom whereupon he produced a shoe box containing cocaine and voluntarily surrendered it to the officers (A-19).

Appellant testified in his own behalf. He contradicted the testimony of Rawald and Ebert, contending that after his arrest the officers demanded at gunpoint entry into his apartment (A-39). Once inside, appellant stated that the officers conducted a search of his apartment (A-42). The court, in denying appellant's motion to suppress, found the testimony of Rawald and Ebert credible and that appellant voluntarily invited the officers into his apartment and surrendered the cocaine (A-71, 72).

(3)

At trial, the Government's evidence consisted of the testimony of Detective Copeland regarding his meetings with appellant and his purchase of cocaine on April 28, 1975. Further, Detective Copeland, as well as other officers who were present on April 17, 1975, in surveillance at appellant's residence, testified to appellant's sale of cocaine to Harvey Rosenberg.[3] The jury also had before it recordings of (i) a conversation at the time of appellant's narcotic transaction of April 17, 1975, (ii) a conversation between Rosenberg and appellant on April 10, 1975, and (iii) a conversation appellant had with Detective Copeland concerning future narcotic transactions held on May 19, 1975.

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[3] Harvey Rosenberg did not testify at appellant's trial. Prior to trial, Rosenberg moved to quash a Government subpoena, contending that he had been promised by the DEA that he would not have to testify and, alternatively, that his testimony would incriminate him concerning a pending state charge. After a hearing, Judge Bramwell denied the motion to quash. Rosenberg's appeal to this Court was dismissed. At appellant's trial, Rosenberg persisted in his assertion of the Fifth Amendment in a hearing outside of the jury's presence (Tr. 248). Judge Bramwell found Rosenberg in civil contempt and he was incarcerated for the duration of appellant's trial.

In response to the Government's evidence, appellant introduced evidence tending to establish alibis for both narcotic transactions. Bernard Meltzer a co-worker of appellant, testified that appellant was working all day on April 17, 1975, and, therefore, could not have sold cocaine to Rosenberg at appellant's residence (A-446, 447). Appellant also introduced the testimony of Debra Pernice, Rita Small and Jean Saccendi who testified that they were with appellant on April 28, 1975, during the time when Detective Copeland testified he bought cocaine from appellant (A-548, 599, 603). By its verdict the jury chose to disbelieve the testimony of these alibi witness.[4]

ARGUMENT

POINT I

Evidence of appellant's consensual surrender of cocaine to the authorities was properly before the jury.

Appellant contends that the cocaine he surrendered to the authorities shortly after his arrest was improperly before the jury. Thus, his conviction for its possession was improper, and its admission tainted his conviction on the remaining counts in the indictment which involved his two prior sales of cocaine. His attack upon the admission into evidence of this cocaine is two-pronged: (1) the district court erred in finding that appellant consensually surrendered the cocaine to the authorities, and (2) the district court erred in failing to dismiss

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[4] Both Debra Pernice and Bernard Meltzer have been indicted for perjury as a result of their trial testimony. On January 20, 1977, a jury found Meltzer guilty of perjury. Ms. Pernice is awaiting trial.

Count Five prior to its submission to the jury. Therefore, appellant argues, the evidence of appellant's surrender of this cocaine should not have been before the jury.

Appellant's argument is frivolous. As the record shows, the district court properly found, after a hearing, that appellant voluntarily surrendered the cocaine to the authorities. Further, although we contend that the district court improperly dismissed Count Five of the indictment after the verdict, this decision had no effect upon the introduction of the cocaine as to the remaining counts because evidence of the seizure of the cocaine was admissible as proof of a similar act.

(1) Appellant voluntarily surrendered the narcotics

When asserting that a warrantless search was made upon the consent of the defendant, the prosecution must bear the burden of proving that the consent was freely and voluntarily given. *Bumper* v. *North Carolina*, 391 U.S. 543 (1968). In evaluating whether or not the prosecution has satisfied that burden the court looks to the "totality of the circumstances." *United States* v. *Faruolo*, 506 F.2d 490 (2d Cir. 1974); *United States* v. *Kohn*, 495 F.2d 763 (2d Cir. 1974); *United States* v. *Mapp*, 476 F.2d 67 (2d Cir. 1973). If, after such an examination, the prosecution has shown that the defendant's decision to allow the search was his own, knowingly made, and not one imposed on him through coercion or deceit, then the courts have found consent and admitted property so obtained in evidence. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

In *Schneckloth* v. *Bustamonte*, *supra*, the Supreme Court established factors which may be considered in

determining the "voluntariness" of a defendant's consent: (1) the defendant's personal characteristics, age and education; (2) the presence or absence of advise of rights; (3) the length of detention prior to consent; (4) the nature of the request for the consent; and (5) the use of any physical punishment. *Schneckloth* v. *Bustamonte*, *supra*, 412 U.S. at 224. This circuit has also considered the degree of affirmative assistance given to the authorities by the defendant relevant in determining the voluntariness of the consent *United States* v. *Candella*, 469 F.2d 173 (2d Cir. 1972); *United States* v. *Rivera*, 321 F.2d 704 (2d Cir. 1963).

Before allowing the Government to offer the cocaine obtained from appellant at the time of his arrest, Judge Bramwell ordered that a full hearing be had to clarify just what had transpired at the time of appellant's arrest. During the course of the testimony, it was brought out that on July 3, 1975, pursuant to a warrant, appellant was arrested as he exited his residence (A-12). Sergeant William Rawald advised him immediately of the charges against him and of his *Miranda* rights (A-13). Appellant stated that he understood his rights and requested that he be allowed to re-enter his residence to make a telephone call and to feed his cat (A-17). Once inside, Sergeant Rawald asked appellant if there was any other cocaine or narcotics in his residence and if so, it would be best that he surrender it (A-19). Appellant led Sergeant Rawald and others to his bedroom where he removed a shoe box containing cocaine from a filing cabinet in a closet and surrendered it to the officers (A-19, 20). No search of appellant's apartment was conducted. (A-21).

Based on this testimony, Judge Bramwell found that appellant invited the officers into his residence and thereafter, voluntarily surrendered the cocaine to them (A-71, 72).

A clearer case of a knowing and voluntary consent would be difficult to imagine.[5]

(2) The Cocaine Appellant Surrendered was Properly Before The Jury Even Though The District Court Erred In Dismissing Count Five

Appellant contends that the district court erred in not dismissing Count Five prior to its submission to the jury apparently on the grounds that it does not properly allege the essential element of intent. From this, appellant argues that since the count was improper the evidence of appellant's surrender of cocaine which formed its basis should not have been before the jury.

This argument fails for a number of reasons. Even though Judge Bramwell dismissed Count Five after the jury's verdict due to a typographical error which the court believed was compounded due to the charge which failed to recognize this error, it does not follow that the cocaine appellant surrendered would be barred from the jury's consideration. While we contend that the district court erred in dismissing Count Five, it is irrelevant, since evidence of this cocaine would properly have been admitted as evidence of a subsequent similar act. *United States* v. *Papadakis*, 510 F.2d 287, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); Rule 404(b), Fed. R. of Evidence.

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[5] Appellant's categorization of this voluntary surrender as a search may very well be misplaced. This Court held in *United States* v. *Messina*, 507 F.2d 73, 76 (2d Cir. 1974), *cert. denied*, 420 U.S. 993 (1975) involving a similar factual incident, that since "the element of an 'intrusion' essential to the existence of a 'search' and consequently of a 'seizure' in connection with a 'search' " was lacking, there was no search or seizure at all. See also, *United States* v. *Edwards*, 465 F.2d 943, 949 (9th Cir. 1972).

Immediately prior to the submission of the case to the jury, appellant, for the first time, moved to dismiss Count Five because of the typographical error which consisted of the word "intelligently" erroneously substituted for "intentionally". (A-6, 760). The district court denied this motion. However, after the jury found appellant guilty on all five counts the district court granted appellant's renewed motion to dismiss Count Five (A-772). Judge Bramwell based his decision on a possible misinterpretation by the jury on the issue of "knowledge and intent" since the court charged them on "intention" even though the indictment stated "intelligently" (A-772).

We contend that the district court erred in its decision. It seems apparent, as we argued below, that the inadvertant substitution of "intelligently" for "intentionally" in Count Five was nothing more than a typographical error. As such, an amendment of Count Five would have been the proper remedy especially in view of the lack of any prejudice toward appellant as a result of this error. See, *United States* v. *Skelley*, 501 F.2d 447 (7th Cir.), *cert. denied*, 419 U.S. 1051 (1974); Wright, Federal Practice and Procedure, Section 127, pp. 273-274. Moreover, the distinction in the wording of Count Five is nothing more than semantics. The term "intelligently" certainly apprised appellant of the requisite degree of intent necessary for him to confront the charge and satisfied the essential element for conviction of this offense. See, *United States* v. *Knippenberg*, 502 F.2d 1056, 1061 (7th Cir. 1974).

In any event even though Judge Bramwell exercised an abundance of caution in dismissing Count Five, it does not follow that evidence of appellant's possession of a quantity of cocaine would be inadmissible as relevant to the remaining charges. Appellant was also convicted of two sales of cocaine. The evidence at trial showed that

appellant sold narcotics which he had in his residence on April 17 and 28, 1975. Moreover, as late as May 21, 1975, appellant engaged Detective Copeland in conversation regarding subsequent cocaine transactions (A-113). On July 3, 1975, shortly after his arrest for these prior illicit transactions, appellant surrendered this quantity of cocaine which he obtained from a filing cabinet in the bedroom of his residence.

Thus, because of the similar nature of the offense and its direct relation and closeness in time to the prior transactions, evidence of this possession of cocaine would properly have been admitted into evidence as a subsequent similar act to show opportunity, plan, knowledge and intent. See, *United States* v. *Super*, 492 F.2d 319 (2d Cir.), *cert. denied*, 419 U.S. 876 (1975); *United States* v. *Nathan*, 476 F.2d 456, 460 (2d Cir. 1973), *cert. denied*, 414 U.S. 823 (1974); Rule 404(b), Fed. Rules of Evidence.

Therefore, appellant was not prejudiced by the admission of evidence of his possession of cocaine at the time of his arrest.

POINT II

The evidence against appellant with respect to the April 17, 1975, cocaine sale was sufficient to convict.

Appellant also contests the sufficiency of the evidence of the April 17, 1975, cocaine sale for which he was convicted. The thrust of appellant's argument is his objection to the introduction of the recorded conversation between Rosenberg and appellant during the narcotic transaction on April 17, 1975. He contends that there was an improper foundation laid to establish that it was

his voice on the taped conversation. This argument is devoid of merit.

As a general rule, courts are cloaked with wide discretion in determining the admissibility of voice identification evidence. *United States* v. *Moia*, 251 F.2d 255 (2d Cir. 1958); 5 Weinstein's Evidence § 901(b)(5) [01].

This Court has held on a number of occasions that a recorded conversation is admissible if the identity of the speaker is satisfactorily established. *United States* v. *Armedo-Sarmiento*, — F.2d —, Slip op. 1276-1282, 1284, 1309 (2d Cir.), decided October 28, 1976; *United States* v. *Allergo*, 539 F.2d 860, 863-64 (2d Cir. 1976); *United States* v. *Chiarizio*, 525 F.2d 289, 296 (2d Cir. 1975); *United States* v. *Borrone-Iglar*, 468 F.2d 419 (2d Cir.), *cert. denied*, 410 U.S. 927 (1972). This principle has been codified in the Federal Rules of Evidence, Rule 901.[6]

In the instant case, Sergeant Rawald testified that based upon his interviews with appellant after his arrest, and listening to the three recorded conversations of appellant, he positively identified appellant's voice on the recorded conversation of April 17, 1975 (A-363). Clearly, this was a proper foundation for the admissibility of the evidence. Its weight, as this Court noted in *Borrone-Iglar*, *supra*, 488 F.2d at 421, was a matter for the jury.

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[6] Rule 901 provides by illustration that evidence of voice identification is admissible if there is a factual showing in conformity with the following example:

> Identification of a voice, whether heard first hand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

In any event, even though Harvey Rosenberg did not testify at trial, the additional evidence adduced clearly established that appellant sold cocaine to Rosenberg on April 17, 1975. Testimony from Detective Copeland and Officers Michael Golub and John Ryan established that on April 17, 1975, Rosenberg, having been sentenced for a narcotics violation and now cooperating with the government, was wired with a recording-transmitting device, exited the officer's vehicle and was observed entering appellant's residence (A-71, 292; Tr. 315). Shortly thereafter, Rosenberg exited appellant's residence, met with Detective Copeland and advised him that appellant had displayed the cocaine and was ready to conduct the transaction (A-71). Rosenberg then re-entered appellant's residence and thereafter exited at which time he immediately delivered a quantity of cocaine to the officers (A-72). Officer Golub testified that he observed appellant enter his residence approximately twenty minutes prior to Rosenberg's arrival and observed appellant exit approximately one hour after Rosenberg left (Tr. 315, 317). Throughout the time that Rosenberg was inside appellant's residence he was not only recording all conversation he had with appellant but also transmitting this conversation. Officer Ryan testified that he monitored this entire conversation (A-294).

Therefore, based on the officers' testimony and the recorded conversation, it is clear that the jury had sufficient evidence to find, as they did, appellant guilty of distributing cocaine on April 17, 1975.

CONCLUSION

The judgment of conviction should be affirmed in all respects.

Dated: Brooklyn, New York
January 31, 1977

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN VALENTI, being duly sworn, says that on the 31st day of January, 1977, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE

of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Irwin Klein, Esq.
400 Madison Avenue
New York, N.Y. 10017

Evelyn Valenti

Sworn to before me this
31st day of Jan. 1977

Carolyn N. Johnson

77